



**Hearing Before the**

**House Small Business Committee,  
Subcommittee on Investigations and Oversight**

**Entitled**

***“The Consumer Product Safety Improvement Act  
and Small Business”***

**Written Testimony of:**

**Anthony F. Vittone, Esq.  
Vice President & General Counsel  
Swimways Corp.**

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Mr. Chairman, Ranking Member Fallin and Members of the Committee: Thank you for holding this hearing and giving me the opportunity to talk with you about the issues small businesses have faced and continue to face as a result of the passage last year of the Consumer Product Safety Improvement Act of 2008.

### **Swimways Overview**

My name is Anthony Vittone, and I am the Vice President & General Counsel of Swimways Corp. Swimways is a small, privately held, family owned company. We are headquartered in Virginia Beach, Virginia where we employ approximately 70 hardworking Americans. In addition, we provide seasonal and temporary employment to an additional 25 employees throughout the year. Our offices consist of manufacturing facilities for our rotational molding equipment, inventory space and office space.

Even if you do not know Swimways by name, I suspect you know our products. In the water products category, Swimways offers 120 different products to customers ranging from 9 months through adulthood. Swimways' brands include many products that consumers ask for by name, including Spring Float<sup>®</sup>, Toypedo<sup>®</sup>, Subskate<sup>™</sup>, Rainbow Reef<sup>®</sup>, Swim Sweaters<sup>™</sup>, and the Safe-T-Seal<sup>™</sup> swim teaching system just to name a few. The Swimways brand of products has been around for over 40 years and is sold in 40,000 storefronts with major retailers and individual pool dealers alike.

Swimways prides itself on continuing to bring innovation and design to the marketplace. Constant market research and product development allows us to provide the features that have made us a leader in the industry. Our goal is to continue to

provide customers with the most entertaining and fun products, featuring only the very best value, quality, style and innovation.

For the past 15 years Swimways has enjoyed an average rate of growth of 15% a year – until 2008 when we took a step backwards. Unfortunately, this step backwards is directly attributable to two factors: (1) The state of the economy; and (2) the passage of the CPSIA.

### **CPSIA Introduction**

The CPSIA, together with the economy, has essentially created a ‘perfect economic storm’. Like most consumer product companies, Swimways is already experiencing a reduction in sales as a result of the state of the national economy. Individual consumers are buying less; therefore, the retailers we sell to are buying less. At the end of 2008 and beginning of 2009, orders from major retailers for the 2009 summer season were being cancelled or reduced. As a result of the CPSIA, inventory had to be scrapped and orders cancelled.

Swimways’ main issue with the CPSIA involves the phthalate provisions. I understand that other toy companies and consumer product companies may have problems with the other provisions, such as the new requirements on lead or tracking labels. While we do not believe those provisions were very well thought through, the primary impact on Swimways involves the new restrictions on the use of phthalates.

I will not revisit in detail the need for these phthalate provisions since Congress has decided that some legislation was needed. However, it is worth pointing out that up until the passage of this Act, the Consumer Product Safety Commission has

consistently opined that oral exposure to DINP phthalates is not likely to present a health hazard to children. In light of the CPSC's conclusions, we would submit that some reasonable accommodations to the businesses that make these products would not be disastrous to Congressional intent.

### **Phthalate Timing**

The timing of the phthalate ban was, in our opinion, the single biggest disaster in the CPSIA.

The European Union began the phthalate craze by passing European Directive 2005/84/EC. The EU passed this law in December 2005 and gave manufacturers and retailers until January 2007 to move through their inventory (i.e., 13 months).

The State of California kicked off the phthalate issue in the United States by passing the so called "California Toxic Toys bill". This bill was signed by the Governor of California in October 2007 and gave manufacturers and retailers until January 1, 2009 (i.e., 15 months) to clear through their inventories.

Conversely, the CPSIA was signed into law in August 2008, but as written it only gave manufacturers and retailers 5 months to clear through their inventory. For any consumer product company, this would be wholly inadequate. For a seasonal company like Swimways, this timeframe was essentially non-existent. I am sure the Members will understand – there are not a lot of pool toys being sold in the United States in the fall and winter. People only buy pool toys when it is warm enough to go to the swimming pool or a natural body of water; that occurs in the summer long after the time period for the CPSIA had long since run out.

Furthermore, whatever time was granted in the CPSIA was completely wasted by the back and forth interpretation of the Act's retroactivity on existing inventory. In November, the General Counsel of the CPSC in a well meaning opinion threw a life-line to the industry by indicating that the phthalate restrictions would only apply prospectively. Ms. Falvey's rationale was reasonable and supported under the law. Manufacturers and retailers breathed a collective sigh of relief and relied on this position. However, the U.S. District Court for the Southern District of New York's reversal of that decision, just 4 days before the enactment was to take place, created a firestorm of irrational behavior in the toy industry. Manufacturers struggled with what to do with their inventories and existing orders for their goods. Retailers scrambled to pull merchandise off their shelves calling Swimways for guidance, chargebacks, destruction orders, re-shipping mandates, etc.

The same product if sold on February 9, 2009 was perfectly acceptable and deemed safe by government and industry standards. The next day that same product became a toxic and dangerous 'weapon of mass destruction.' I would ask Congress to consider this simple question: If the use of phthalates is such a hazard to American children, why has Congress not ordered the CPSC to do an industry-wide recall of all products that contain phthalates, regardless of when they were sold from the beginning of time?

Congress wants children's consumer products to be made without phthalates. That is an understandable objective, but that guideline could have been adopted without further burdening an industry already struggling with the retraction of the American

economy. Swimways urges Congress to amend the CPSIA to make the phthalate restrictions prospective and apply to goods manufactured after February 10, 2009.

### **Imbedded Phthalates**

The CPSIA includes a specific legislative exemption for imbedded lead. However, no such exemption was given for the significantly more benign phthalates. As the Members know, under standard statutory construction, the courts will interpret the CPSIA to mean that Congress intended no imbedded phthalate exemption to exist.

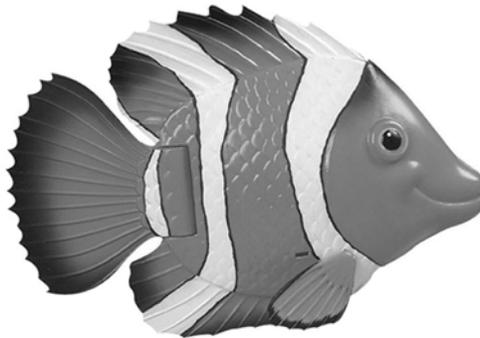
Swimways manufactures products which only contain phthalates on the plastic that surrounds the wires in the battery compartment for the product. The only way to access the phthalates is to take the product completely apart. We offer inflatable products which contains phthalates in the PVC, but the PVC is completely covered with fabric. Again, there is no ability to access the phthalates unless the customer essentially destroys the product. These products present no risk to the consumer and should be available for sale. We request that an imbedded phthalate exception be added to the CPSIA.

### **Age Requirement for P6 v P3 Compliance**

Both the CPSIA and the California legislation prohibit 3 phthalates (DEHP, DBP and BBP) from being used in the manufacturing process of all toys and childcare articles. However, the two legislations differ on their treatment of the other 3 phthalates (DINP, DIDP, DnOP) with significant consequences.

The California legislation only prohibits the second 3 phthalates for childcare articles and toys intended for children 3 and under. The federal legislation forbids them for children up to age 12 and under if they are able to be put in the mouth. I am sure the Members would agree that a 10 year old child has long since passed the period when they are putting things in their mouth out of curiosity and sucking on them to relieve teething or coax themselves to sleep. Yet, this small and presumably inadvertent change in the law has made it unlawful for Swimways to sell a large quantity of goods that should be available for sale.

Swimways manufactures a product called the Rainbow Reef fish, which are battery powered to swim like a fish in a swimming pool.



We have sold over 7,000,000 units of this product. Prior to 2009, the fins of these swimming fish were made with phthalates. Even though Rainbow Reef fish are age graded for children 5+, there are nearly 15,000 units of this product that are now useless because the fins 'can be placed in the child's mouth.'

That is not the intent of the product and I will go out on a limb to say that that is not what happens with the product. We have no reports of children sucking on the fins to relieve teething or to help a child go to sleep. The CPSIA should be amended to

allow products not intended for children 3 and under to be manufactured using certain phthalates.

### **Sporting Goods v. Toys**

Adding further confusion to the marketplace is the exemption of sporting goods from the CPSIA. It is not clear what is defined as a sporting good and what is defined as a toy. The CPSC has offered limited guidance but more detailed criteria are needed. In our experience, retailers are not willing to take a chance and are using a broad brush approach – ‘if it’s for a kid, it’s a toy.’

### **A Representative Example: Spring Jam Basketball**

Soon after the New York Court’s ruling in February, retailers went into a complete panic. They had 4 days to review their inventory, determine which products were compliant with the CPSIA and remove the merchandise from the shelves. As a result of the severely compressed timeline, broad-brush reactionary decisions were made and manufacturers, like Swimways, were expected to absorb the cost.

Another product we manufacture is called the Spring Jam Basketball. This product is essentially an inflatable floating basketball goal covered in fabric and includes a basketball. We have sold over 750,000 units of this product since 2005. A picture of the product is included below:



In February, a large retailer had approximately 10,000 units of this product in their stores and distribution centers. This inventory was a mixture of products from 2008 that contained the DINP phthalate and 2009 product that is phthalate free. Nevertheless, the retailer immediately removed all of the Spring Jam inventory from their shelves.

We reviewed the item and explored with the retailer whether the product was a sporting good or a toy. We offered to send a team to sort through and separate the 2008 non-compliant inventory from the 2009 phthalate free product.

None of these efforts helped. It eventually came to light that the retailer had destroyed the goods shortly after the February 10<sup>th</sup> deadline. What was even more tragic was that less than 15% of the 10,000 units contained phthalates. But under the hysteria of February and the compressed timeline, the retailer chose not to sort through the products and merely trashed all of the goods. I would make the following observations:

- Under the California Act, these goods would have been compliant.

- If there had been an imbedded phthalate exception in the CPSIA, these goods would have been compliant.
- Had the CPSIA allowed for a greater timeframe to move through existing inventory, this problem would not have occurred.

The retailer is now insisting on a \$100,000 credit for the destruction of the Spring Jam inventory. This is one example with Spring Jam Basketball. Other retailers have destroyed other units of this product. Regrettably, by the destruction of these products, the landfills have been filled but the cause of consumer safety has not been advanced.

### **Effect of Phthalates on Swimways**

The effect of the CPSIA and its phthalate restrictions for Swimways has been profound.

- (1) A large portion of the inventory in our VA Beach warehouse (approximately 37,000 units) was rendered obsolete and had to be written off. This write-off resulted in a 47% reduction in our profitability for 2008.
- (2) Swimways was required to spend additional resources to rework other inventory in order to make it compliant with the CPSIA's phthalate requirements.
- (3) We received significant chargebacks, returns, destruction charges, re-delivery expenses from retailers that insisted that we credit them for Swimways inventory that was rendered obsolete by the CPSIA.

(4) Orders were cancelled because we could not fulfill the purchase orders with compliant goods (even though non-compliant goods existed in our warehouse).

(5) We will have destruction costs for inventory that will have to be trashed.

The collective financial expense of the CPSIA for Swimways has exceeded \$1,000,000.

In addition to these direct financial hits, Swimways has seen other indirect effects. Hiring at Swimways has been put on hold. Our bank that finances our operations is currently reevaluating its relationship with us because we have not hit our profitability covenant for 2008. Resources that would be spent in growing our business had to be used on compliance with the CPSIA. Personnel have been redirected from the core business to dealing with the aftermath of the CPSIA. Finally, the manpower by Swimways personnel to sort through and comply with the Act and various interpretations and deadlines of the Act reduces our ability to focus on growing the business.

The toy industry is overwhelmingly made up of small businesses like Swimways. The Toy Industry Association has estimated that the cost of this legislation to the toy industry has been \$2,000,000,000. We all need some relief from this Act and we trust that Congress will respond.

Thank you for your time and attention to these matters.